FILED
FEB 23 195
HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 578.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; and MISSOURI-ILLINOIS RAILROAD COMPANY, a Corporation,
Petitioners,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES L. HOMIRE,
JOHN E. McCULLOUGH,
ALVIN J. BAUMANN,
ERNEST D. GRINNELL, JR.,
300 Frisco Building,
St. Louis 1, Missouri,
Counsel for Respondent.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

INDEX.

Page

Statement 1

Reasons for denying the writ..... 7

I. The action arose under the Interstate Commerce Act and jurisdiction is conferred by that act and by Section 1337 of the Judicial Code..... 7

II. The limitation provisions of Section 16 (3) (a) and (e) do not apply to this action..... 10

III. Disagreement with the decision of the Court of Appeals on the merits does not constitute adequate grounds for a writ..... 16

Conclusion 17

Cases Cited.

Alabama Power Co. v. Ickes (1938), 302 U. S. 464, 477 17

Alton R. v. United States (1932), 287 U. S. 229, 235-6..9, 10

Atlantic Coast Line R. Co. v. Baltimore & Ohio R. Co. (D. C. Maryland, 1935), 12 F. Supp. 711..... 13

Atlantic Coast Line v. Boston & Maine (D. C. Mass., 1937), 18 F. Supp. 886..... 14

Atlantic Coast Line v. Delaware & H. R. Corp. (C. C. A. 2, 1936), 86 F. 2d 721..... 14

Atlantic Coast Line R. Co. v. Pennsylvania R. (D. C. Penn., 1935), 12 F. Supp. 726..... 13

California Oil & Gas Co. v. Miller (C. C. Calif., 1899), 96 Fed. 12..... 8

Consolidated Freightways, Inc., v. United Truck Lines (C. A. 9, 1954), 216 F. 2nd 543..... 8

Graver Mfg. Co. v. Linde Co. (1949), 336 U. S. 271, 274-5 17

Great Northern Ry. Co. v. Merchants Elevator Co. (1922), 259 U. S. 286, 290 7
Gully v. First Natl. Bank (1936), 299 U. S. 109, 112-114 8

In Re Lennon (1897), 166 U. S. 548, 553 9

Kansas City, Kansas, v. A. T. & S. F. Ry. Co. (U. S. D. C. Kan., 1951), 101 F. Supp. 1, 5 7

McGoon v. Northern Pac. Ry. (D. C. N. Dak., 1913), 204 Fed. 998 8
Midstate Horticultural Co. v. Pennsylvania R. Co. (1943), 320 U. S. 356 14

Shulthis v. McDougal (1912), 225 U. S. 561 8
St. Louis S. W. Ry. Co. v. Bolinger (C. C. A. 5, 1927), 17 F. 2d 924, 925 14

Texas & N. O. R. Co. v. Ry. Clerks (1930), 281 U. S. 548, 558 17

Statutes Cited.

28 U. S. C., Sec. 1337 ..... 6, 7
49 U. S. C., Sec. 1 ..... 2, 4
49 U. S. C., Sec. 1 (4) 8, 9, 10
49 U. S. C., Sec. 6 (1) 2
49 U. S. C., Sec. 16 (3) (a) (e) 6, 10, 11, 13, 14, 15

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 578.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; and MISSOURI-ILLINOIS RAILROAD COMPANY, a Corporation,
Petitioners,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petitioners' statement of the case (Petition pp. 3-6) does not present the facts sufficiently to develop the manner in which the case arose, the position of the parties on the questions presented, or the holdings of the Courts below. We, therefore, offer the following statement so that the Court may be more fully advised on these matters.

The Petition for Writ of Certiorari seeks review of a judgment of the Court of Appeals for the Eighth Circuit

which affirmed a judgment of the United States District Court for the Eastern District of Missouri, Eastern Division, rendered against the Petitioner, Missouri-Illinois Railroad Company, for $361,078.05 with interest at the rate of 6% per annum from August 25, 1947, together with costs (R. 160), in an action arising out of a dispute between the parties, common carriers by railroad engaged in interstate commerce, and subject to the provisions of the Interstate Commerce Act (49 U. S. C., Sec. 1 et seq., hereinafter called "the Act") (Supp. R. 2), over the construction of Southwestern Lines Division Sheet 100 and Supplements 24, 25, 46, 47, 48, 51, 52 and 53, thereto (Pl. Exs. 1-9, reproduced in part, R. 21-69, Supp. R. 10-32, hereinafter collectively called "the Division Sheet" or "Division Sheet 100"). The Division Sheet was published pursuant to an agreement between numerous rail carriers, including Petitioners and Respondent (Supp. R. 4)—originally entered into after extensive hearings, reports* and an order (R. 136-140) by the Interstate Commerce Commission. It provides, among other things, for the division between the parties thereto of revenue determined by the use of commodity joint rates as published in a joint agency tariff (Supp. R. 7) filed with the Interstate Commerce Commission as provided in Section 6 (1) of the Act [49 U. S. C., Sec. 6 (1)] for the transportation of 7,131 tank cars of crude petroleum oil from Greig, Oklahoma, to Selmaville, Illinois, during the period June 1, 1944, to October 31, 1945 (Supp. R. 2). All said cars of petroleum oil were routed via the St. Louis-San Francisco Railway Company (Frisco), Respondent, from Greig, Oklahoma, to St. Louis, Missouri, thence via Petitioner railroads, Missouri Pacific Railroad Company to Flinton, Illinois, and Missouri-Illinois Railroad Company to Selmaville, Illinois, and so moved (Supp. R. 9). This routing of said cars was over a through route to which a joint through rate was applicable (Supp. R. 9).

* See 148 I. C. C. 457-483 and 156 I. C. C. 94-106.

The total revenue derived from the transportation of the crude petroleum oil amounted to $1,322,630.31. Said sum was prepaid by the shipper to Frisco as the originating carrier, and Frisco credited the entire sum to Missouri-Illinois as the settling carrier, in conformity with the applicable Railway Accounting Rules (Supp. R. 3).

Missouri-Illinois then distributed, i. e., divided, said revenue according to its interpretation of Division Sheet 100, crediting itself with the sum of $290,978.68, or 22% of the total revenue; crediting Frisco with the sum of $670,573.58, or 50.7% of the total revenue; and crediting Missouri Pacific with the sum of $361,078.05, or 27.3% of the total revenue (Supp. R. 3).

Divisions, as claimed by Respondent, based upon St. Louis-East St. Louis as the interterritorial divisional gateway would have given to the Frisco 78% of the total revenue, or $1,031,651.63, and to Petitioners jointly 22% of the total revenue, or $290,978.68 (Pl. Ex. 12, Supp. R. 33-35; Pl. Exs. 29, 29-A, Supp. R. 75-79).

The settlements made by the Missouri-Illinois reflect the use by it of the divisional factors in Division Sheet 100 to and from Flinton, Illinois, disregarding the divisional factors to and from St. Louis-East St. Louis, and were predicated upon the contention that Division Sheet 100 provided divisions based on Flinton, Illinois, as the primary divisional gateway, notwithstanding the fact that all the shipments moved through the St. Louis-East St. Louis gateway, were interchanged thereat, and there passed from Southwestern Territory into Illinois Freight Association Territory.

Respondent brought this suit in the District Court to recover the difference between the amount of money credited to it by the Missouri-Illinois using Flinton, Illinois as the interterritorial divisional gateway, and the sum to which it claimed it was rightly entitled by using

St. Louis-East St. Louis as the interterritorial divisional gateway.

The complaint, as amended, based jurisdiction upon the allegation that the action arose under the Interstate Commerce Act, 49 U. S. C., § 1 et seq. (R. 17),* and prayed judgment against Missouri-Illinois or in the alternative for judgment against Missouri-Illinois and Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, for the specific portion of the sum claimed which each of them received as a result of the erroneous construction of the Division Sheet (R. 5).

By stipulation (Supp. R. 1-9) the parties narrowed the issues so that the District Court was required to decide only whether it had jurisdiction and whether the Missouri-Illinois had properly applied Division Sheet 100.

After receiving evidence concerning the interpretation of the Division Sheet, the District Court issued a memorandum opinion, 117 Fed. Supp. 57, and findings of fact and conclusions of law in which it concluded, among other things: (1) that the action arose under the Interstate Commerce Act; (2) that jurisdiction was conferred upon it by that Act; (3) that resort to the Interstate Commerce Commission was unnecessary in this case; (4) that Division Sheet 100 and its supplements were published pursuant to a duty imposed by the Act; and (5) that when the Missouri-Illinois wrongfully divided the revenue contrary to the applicable provisions of the Division Sheet, it omitted to do an act required to be done by the Interstate Commerce Act (R. 159).

In construing the Division Sheet, the District Court found that "the evidence sustains a principle—the Docket 15234 principle—that on all interterritorial traffic between South-

---

* There is no diversity of citizenship, all parties being citizens of the State of Missouri (R. 1-2, Supp. R. 2).

western Territory and Western Trunk Line—Illinois Freight Association Territory the gateway on the boundary where the traffic passes from one territory to another is the governing gateway for interterritorial divisional purposes, not only when interchange occurs at that gateway but also when traffic passes through it without interchange, unless there is a specific provision in Division Sheet 100 (or its supplements) or an agreement to the contrary" (R. 158). The Court further found that there were no exceptions in the Division Sheet which would nullify St. Louis-East St. Louis as the interterritorial divisional gateway on the traffic in question, and that St. Louis-East St. Louis was the interterritorial gateway on the traffic involved (R. 158) and gave Respondent judgment against Missouri-Illinois for the full amount prayed (R. 160).

Petitioners appealed and the Court of Appeals found that the findings of fact of the District Court were supported by substantial evidence. The Court of Appeals held that federal jurisdiction of this type of case was necessary to accomplish the intent of Congress to provide uniform regulation concerning divisions, and affirmed the holding of the District Court that jurisdiction was conferred by the Interstate Commerce Act. All three judges concurred in this holding which was based upon the premise that the "* * * essential purpose of the action was to enforce a right of the plaintiff to have the defendants perform a duty prescribed by Section 1 (4) of the Act * * *" (Opinion p. 9), which provides that it shall be the duty of every common carrier in the case of joint rates to establish just, reasonable and equitable divisions thereof which shall not unduly prefer or prejudice any participating carrier.

The Court of Appeals further held that the duty to "establish" just divisions could not be limited to merely

signing writings concerning them, but "meant to originate, agree upon and **apply such divisions** in conducting the business to which the statutory regulation applies" (Opinion p. 10, emphasis added). Since the duty to make the division according to law derives directly from the Interstate Commerce Act, Sections 8 and 9 of that Act provide authority to sue in the District Court for any part of interstate freight divisions claimed to have been wrongfully withheld from one carrier by another. In addition to Sections 8 and 9 of the Interstate Commerce Act, the opinion held that jurisdiction was plainly conferred by Section 1337 of the Judicial Code (28 U. S. C., Sec. 1337) (Opinion p. 11).

One judge delivered a separate opinion in which he specifically concurred in the holdings that the District Court had jurisdiction and that the statute of limitations was not applicable. His dissent was limited to his view of the merits.

The question of the application of the limitation provisions of Sections 16 (3) (a) and (e) of the Act [49 U. S. C., Sec. 16 (3) (a) (e)] to the present suit was not raised by Petitioners until the filing of their Reply Brief in the Court of Appeals. For that reason the District Court did not, of course, make any specific pronouncement concerning these sections.

The Court of Appeals, however, specifically held that these sections did not apply to this action "because the complaint here is not for the recovery of 'charges' or 'overcharges' " (Opinion p. 13). One judge of the Court of Appeals, in a separate concurring opinion, expressed some hesitancy in joining in this ruling, but did not dissent from the view of the other two judges, both of whom ruled that the sections did not apply to this action.

REASONS FOR DENYING THE WRIT.

I.

The Action Arose Under the Interstate Commerce Act and Jurisdiction Is Conferred by That Act and by Section 1337 of the Judicial Code.

By an incomplete process of elimination, Petitioners attempt to show that no federal question is presented by the facts in this case. First, they say, that the existence or non-existence of divisions is not a tariff matter and since this case does not involve the construction of a tariff, no federal question is involved. In support of this proposition they cite **Great Northern Ry. Co. v. Merchants Elevator Co.** (1922), 259 U. S. 286, 290, a suit brought by a shipper to recover overcharges from a carrier in which this Court held that, in some instances, the Courts have jurisdiction to construe the provisions of a tariff without preliminary resort to the Interstate Commerce Commission. Nothing in that case can be construed as defeating jurisdiction here because an entirely different situation was involved. Parenthetically, however, it might be noted that the discussion by the Court of Appeals in this case, concerning the desirability of uniform decision and regulation, is in full accord with the views of this Court on uniformity as stated in the **Great Northern Case.**

Secondly, Petitioners say that the mere fact that a carrier is under the Interstate Commerce Act is not sufficient, in and of itself, to confer jurisdiction, citing **Kansas City, Kansas, v. A., T. & S. F. Ry. Co.** (U. S. D. C. Kan., 1951), 101 F. Supp. 1, 5, a suit to force repayment of an overcharge on an **intrastate** shipment. Obviously that case does not have any factual similarity with this case or announce any principle which could defeat jurisdiction in the present case.

Finally, Petitioners say that the present suit is merely a breach of contract case and that the construction of that contract does not involve the construction of any federal law. In support of this proposition they cite **California Oil & Gas Co. v. Miller** (C. C. Calif., 1899), 96 Fed. 12, a quiet title suit; **McGoon v. Northern Pac. Ry.** (D. C. N. Dak., 1913), 204 Fed. 998, a suit by a shipper to recover alleged damage to livestock by reason of defendant's failure to perform its duty as a common carrier in which removal to a federal court was held proper on the grounds that the suit was brought to enforce a right granted by federal law; **Shulthis v. McDougal** (1912), 225 U. S. 561, a suit brought to determine conflicting rights to a tract of land in the Creek Nation; **Gully v. First Natl. Bank** (1936), 299 U. S. 109, 112-114, a suit by a state tax collector against the successor to an insolvent bank to recover taxes owed by the insolvent bank; and **Consolidated Freightways, Inc., v. United Truck Lines** (C. A. 9, 1954), 216 F. 2nd 543, a suit to recover damages based upon an alleged violation of the provisions of Part II of the Interstate Commerce Act, which was specifically dismissed because Part II of that Act did not contain sections comparable to Sections 8 and 9 of Part I of the Act.

The fallacy of Petitioners' reasoning is apparent. By overlooking the basic nature of the case at bar, it being a suit brought to enforce a right of plaintiff to have defendants perform a duty prescribed by Section 1 (4) of the Interstate Commerce Act, they attempt to bolster their contention that the District Court was without jurisdiction. Broad general statements of law concerning federal jurisdiction, such as those cited by Petitioners, are of little value unless their specific application to the present case is shown. Petitioners have wholly failed to demonstrate the application of those principles to the present case.

Nothing in Petitioners' argument attempts to attack the soundness of the reasoning of the opinion of the Court of Appeals. Petitioners do not claim or cite any cases to refute the proposition that the essential purpose of this action was to enforce a right of Respondent to have Petitioners perform a duty prescribed by Section 1 (4) of the Interstate Commerce Act. Nor do they maintain that any of the authorities cited by the Court of Appeals in support of its jurisdictional holding are not applicable to the present case. Furthermore, Petitioners make no showing that any of the considerations governing review on certiorari, as stated in Rule 19 of this Court, are present.

The opinion of the Court of Appeals is in full accord with decisions of this Court. In **Alton R. v. United States** (1932), 287 U. S. 229, 235-6, this Court held that each carrier is entitled as of right to divisions agreed upon and that a carrier individually is legally without right to depart from such an agreement. If an individual carrier does so depart, it amounts to a resort to force to change the agreement rather than a judicial determination of divisions in accordance with the provisions of the Interstate Commerce Act. A party aggrieved by such a departure may, therefore, sue at law for the division wrongfully withheld.

The holding of the Court of Appeals that such a suit may be brought in a federal court because it is brought for the purpose of enforcing a duty imposed by the Interstate Commerce Act is based upon **In Re Lennon** (1897), 166 U. S. 548, 553. The basic principle announced in the **Lennon** case has been consistently followed throughout the years.

We, therefore, submit that Petitioners have wholly failed to present any valid reason for the granting of a Writ of Certiorari to consider the first question presented.

II.

The Limitation Provisions of Section 16 (3) (a) and (e), Do Not Apply to This Action.

Petitioners' argument that jurisdiction of this case is barred by the limitation provisions of Section 16 (3) (a) and (e) of the Interstate Commerce Act, 49 U. S. C. § 16 (3) (a) (e) advances three propositions: First, that the Court of Appeals broadened the meaning of Section 1 (4) of the Act by holding that the phrase "to establish just, reasonable and equitable divisions" meant to maintain and apply those divisions; second, that the Court of Appeals narrowed the meaning of Section 16 (3) (a) and (e) by holding that the limitation provisions contained therein did not apply to an action between carriers to recover divisions; and third, one involving an irrelevant play on words that the Court of Appeals was inconsistent in excepting this action from the operation of Section 16 (3) while failing to apply an exception in the construction of the division agreement. We will treat these arguments in the order stated.

The Court of Appeals, in construing the "to establish" phrase of Section 1 (4) to require the maintenance of divisions, was merely applying a sound principle announced by this Court in **Alton R. v. United States** (1932), 287 U. S. 229, 235-6, where this Court said:

> "* * * the divisions * * * were established by agreement of the carriers participating in the transportation. The divisions were a term of that agreement. So long as the joint rates voluntarily established remain in force, each carrier is entitled as of right to the division originally agreed upon, unless a readjustment of the divisions has been made either by the parties or by the Commission pursuant to the power conferred by paragraph 6 of § 15. The connecting carriers were legally without power to reduce

the divisions of the Alton over its objection. If they deemed its divisions unreasonably large, they could have invoked the power of the Commission to make a reduction. Instead of applying to the Commission to adjust the existing divisions they resorted to force. Availing themselves of their strategic position as collectors of the freight, they withheld from the Alton a part of what was due it.

"The Alton might have sued at law for the part of the divisions wrongfully withheld. St. Louis S. W. Ry. Co. v. Bolinger & Co., 17 F. (2d) 924; compare Malvern & F. V. R. Co. v. Chicago, R. I. & P. Ry. Co., 182 Fed. 685."

Petitioners' attempt to distinguish the **Alton Case** because it was brought under the Urgent Deficiencies Act (Petition p. 9) overlooks the manner in which that case arose. Divisions were wrongfully withheld from the Alton in violation of an existing agreement. The Alton appealed to the Interstate Commerce Commission for relief, but this Court held that the Alton might have sued at law—as the present Respondent chose to do—to recover the part of the divisions wrongfully withheld. In the present case the District Court held that resort to the Interstate Commerce Commission was not necessary (R. 159), and Petitioners have not objected to that holding. In this connection we submit that the Court of Appeals properly relied upon the **Alton Case.**

Petitioners' reliance upon the limitation provisions of Section 16 (3) is in the nature of a "confession and avoidance." They argue that the Court of Appeals, using a doubtful case as authority, has narrowed the application of these provisions and conferred jurisdiction by acquiescence.

The Court of Appeals specifically concluded that the limitation provisions of Section 16 (3) are not applicable

here for the reason that the complaint "is not for the recovery of 'charges' or 'overcharges'" (Opinion p. 13). The admitted facts compel such a holding.

The "charges" to the shipper for the transportation of the crude petroleum oil were prepaid to Respondent (R. 71) and transferred to Missouri-Illinois by a bookkeeping entry in accordance with the applicable accounting rules (Supp. R. 2-3). The parties stipulated as to the amount of such charges (Supp. R. 7). The transportation for which those charges were assessed was performed by the parties jointly and was completed (Supp. R. 2). Each of the railroads involved was performing common carrier service for the shipper and not for any other party to this suit. The amount of money sought by Frisco in this suit is not due it by reason of any service performed by it for the Missouri-Illinois, but is a portion of the sum collected from the shipper. The Missouri-Illinois held the total sum with a legal obligation to pay the correct portion of it to each of the carriers participating in the transportation services furnished to the shipper. The Missouri-Illinois' duty, which the Courts below held arose under the Act, was to divide the total fund properly in accordance with the division agreement. The duty to pay over a portion of the total fund to the Respondent did not arise by reason of any services rendered to the Missouri-Illinois by Respondent.

> "The word 'rate' as used in the Interstate Commerce Act means the net cost to the shipper; the net amount the carrier receives and retains for the transportation service. United States v. Chicago, etc., Co. (D. C.), 148 Fed. 646. The word 'fare' means the rate of charge for the carriage of passengers (19 Cyc. 456); money paid for a voyage or passage (Bouvier's Law Dictionary). **A charge is the price fixed or demanded for services rendered.** Fulmer v. Southern Ry. Co., 67 S. C. 262, 45 S. E. 196." (Emphasis

added.) **Clark v. Southern Ry. Co.** (Ind. App., 1918), 119 N. E. 539, 542. See also Union L. H. & P. Co. v. City of Fort Thomas (Ky., 1935), 261 Ky. 100, 87 S. W. 2d 103, 105, and United States v. C. & A. Ry. Co. (D. C. Ill., 1906), 148 F. 646, 647.

We respectfully submit that the separate concurring opinion which expressed some hesitancy as to the limitation holding may have resulted from overlooking the facts that the transportation was completed and the charges therefor paid by the shipper before this dispute arose, and that no party to the dispute performed any common carrier service for any other party to this action. This hesitancy may have arisen from the fact that the limitation provisions of Section 16 (3) were raised for the first time in Petitioners' Reply Brief in the Court of Appeals.

The opinion of the Court of Appeals is based upon **Atlantic Coast Line R. Co. v. Baltimore & Ohio R. Co.** (D. C. Maryland, 1935), 12 F. Supp. 711, which passed upon the exact point here raised. Petitioners say that the **Atlantic Coast Line Case** was a diversity of citizenship case, but they apparently overlook the fact that the limitation provisions of Section 16 (3), if applicable, defeat jurisdiction in such a case as completely as they defeat jurisdiction in a case not based upon diversity of citizenship. There is no basis for Petitioners' criticism of the Court of Appeals' statement that the **Atlantic Coast Line Case** has been accepted by the railroads without protest by the Interstate Commerce Commission. Other federal courts have accepted that decision without questioning the soundness of the holding with regard to Section 16 (3). See **Atlantic Coast Line R. Co. v. Pennsylvania R.** (D. C. Penn., 1935), 12 F. Supp. 726.

The **Atlantic Coast Line Case**, cited by the Court of Appeals, was only one of a series of cases arising out of a general division dispute concerning Florida citrus rates,

and while this series of cases produced varied results and many comments upon division disputes, none of these cases question the soundness of the construction of Section 16 (3) here followed. See **Atlantic Coast Line v. Boston & Maine** (D. C. Mass., 1937), 18 F. Supp. 886; **Atlantic Coast Line v. Delaware & H. R. Corp.** (C. C. A. 2, 1936), 86 F. 2d 721.

In **St. Louis S. W. Ry. Co. v. Bolinger** (C. C. A. 5, 1927), 17 F. 2d 924, 925, cited with approval in **Alton R. Co. v. United States** (supra), a Louisiana State limitation statute relating to the recovery of erroneous freight charges was held to have no application to a dispute concerning divisions.

Midstate Horticultural Co. v. Pennsylvania R. Co. (1943), 320 U. S. 356, cited by Petitioners (Petition, p. 10), does not pass upon the question here involved. That case correctly held that an action by a carrier to recover the full amount of transportation charges from a shipper is subject to the limitation provisions of Section 16 (3) and that these limitations cannot be extended by a separate agreement between the carrier and shipper entered into prior to the expiration of the period. The opinion of the Court of Appeals is not in any way at variance with that decision, which clearly has no application to the present case.

The claim that the Court of Appeals has been inconsistent in its treatment of "exceptions" (Petition, p. 11) is equally without foundation because such claim attempts to compare the construction placed upon a particular contract with the construction of a statute. This claim is no more than an irrelevant play on the word "exception." Manifestly, the same rules need not apply to both situations, particularly where, as here, there is no logical or factual relationship between them. The Court of Appeals affirmed the finding of the District Court that there was no appli-

cable exception in the Division Sheet. It reasoned correctly that the word "charges" in Section 16 (3) of the Interstate Commerce Act does not embrace divisions and, therefore does not apply to an action between carriers. Petitioners' argument that the Court of Appeals has read an exception into Section 16 (3) (a) when none exists because that section begins "ALL actions at law" is merely diversionary as it seeks to place emphasis upon the wrong word in the section and emasculates the controlling word, "charges." The Court of Appeals properly held that "charges" is the decisive word in determining whether Section 16 (3) (a) applies to this case.

The test as to whether this action arose under the Interstate Commerce Act is not, as Petitioners claim, whether it is subject to Section 16 (3) (Petition p. 10), but is, as the Court of Appeals properly held, whether the duty sought to be enforced derives from the Interstate Commerce Act.

Petitioners have not advanced any substantial reason why certiorari should be granted upon the second question presented. Their allegation, that it is an important federal question which has not heretofore been passed upon by this Court, is without foundation. This Court has time and again passed upon the meaning of the Interstate Commerce Act and the various sections thereof. There is no need for this Court to concern itself with the definition of the word "charges" in a case where the fund involved and the sum sought are clearly outside of any standard definition of that word. This is especially true when all lower Federal Courts which have passed upon the matter are in accord.

We, therefore, submit that the Court of Appeals correctly decided that Section 16 (3) (a) and (e) has no application to the present action and for that reason a Writ of Certiorari should not be granted.

III.

Disagreement With the Decision of the Court of Appeals on the Merits Does Not Constitute Adequate Grounds for a Writ.

Petitioners' argument under the subject "Primary Divisions Break Over the Flinton, Illinois, Gateway," merely represents a restatement of Petitioners' position on the facts of the case as presented to both the District Court and the Court of Appeals.

The basis of Petitioners' argument is an alleged admission by Respondent that Item 66-B of Supplement 52 is "an exception to the general provisions of the Division Sheet" (Petition pp. 11, 14). Actually no such admission was made. Petitioners refer to page 127 of the Record as authority. For a proper narration of the testimony, see page 64 of the Supplemental Record which shows that the witness was not discussing the traffic involved in this case, but was explaining the application of this item to a movement illustrated in Plaintiff's Exhibit 24 (Supp. R. 65). This same argument was advanced by Petitioners in the Court of Appeals and we think that the discussion, beginning on page 5 of that Opinion, amply answers all of the contentions now advanced by Petitioners.

Nowhere is it alleged that the Court of Appeals has decided the case contrary to any other decision on the same matter, or in any way is in conflict with any decision of this Court. Likewise it is not alleged that the decision of this question presents an important question of Federal law which has not heretofore been settled by this Court.

The Courts below were called upon to decide the meaning of a written agreement. Much of the evidence presented to the District Court was presented by way of stipulation. The disputed evidence in the case represents the

conflicting opinions of qualified experts on the subject. The District Judge, upon considering all of this evidence, was of the opinion that St. Louis-East St. Louis was the inter-territorial divisional gateway on the shipments involved. This opinion was affirmed by the Court of Appeals which found that the findings and conclusions of the District Court were supported by substantial evidence. Under well-established rules, this Court has, for many years, accepted findings in which two courts concur, unless clear error is shown. [**Texas & N. O. R. Co. v. Ry. Clerks** (1930), 281 U. S. 548, 558; **Alabama Power Co. v. Ickes** (1938), 302 U. S. 464, 477; **Graver Mfg. Co. v. Linde Co.** (1949), 336 U. S. 271, 274-5]. Petitioners have neither alleged nor shown any such error.

CONCLUSION.

Since the petition does not disclose that the opinion of the Court of Appeals conflicts with the decision of any other Court of Appeals on the same matters, and does not disclose that any important question of Federal law not previously decided by this Court is here presented, and does not disclose that any Federal question has been decided in a way in conflict with applicable decisions of this Court, we submit that the petition for a writ of certiorari should be denied.

JAMES L. HOMIRE,
JOHN E. McCULLOUGH,
ALVIN J. BAUMANN,
ERNEST D. GRINNELL, JR.,
300 Frisco Building,
St. Louis 1, Missouri,
Counsel for Respondent.

Dated February 28, 1955.